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## THE THEORY OF FEDERALISM. THE FEATURES OF THE FEDERAL ORDER OF THE STATE

Any considerations on the theory of federalism should state at the very outset that there is no single pattern of federalism to which one could appeal. It is impossible to construct a single model of federalism which might, in turn, be regarded as the ideal type, which could then serve as a yardstick when it comes to examining each individual case that relates to a federal system.

However, we cannot completely reject attempts to establish such a model in our research on federal systems.<sup>1</sup> It should be noted that there is a vast catalogue of ideas and institutions that are constitutive of federal principles in political systems, albeit not all of these elements can necessarily be implemented in every federal state. This catalogue will always remain broader than the catalogue of institutions and federal ideas which is characteristic of particular states. One encounters very early on a research problem when it comes to determining which ideas and institutions are essential in order for us to be able to speak in terms of a federal regime, and how many of them should be implemented within it.

Another observation relates to their actual application in governmental practices, because – as we can easily learn from history – the letter of law is not always compatible with governmental practices. This qualification is in no way restricted to undemocratic regimes. The tendency towards centralization is more frequent and is constantly increasing, which in turn explains why even in federal democratic states the federal principle is being weakened and impeded by the central government.

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<sup>1</sup> Such approach is presented, for example, by W. Suhecki, *Teoria federalizmu*, Warszawa 1968, p. 79.

## 1. THE USES OF THE TERM

In discussing the issues connected to a political system within a federal state various terms can be used in order to illustrate their character or to grasp the phenomenon itself. Despite the fact that they sometimes seem to be synonymous there are some differences between them. Below we present some of the basic issues concerning the terms used in describing the phenomena in question.

### 1.1. Federalism and federation

The two terms are strictly linked with one another. Both are derived from the Latin term *foedus*, which means relationship or covenant. There is no single and universally accepted scientific definition of these phenomena. The proximity of these terms is apparent in that they must be used to explain one another – something that may raise objections – but they simply cannot be severed.

Federalism is a relatively new term and was introduced into the language in the nineteenth century.<sup>2</sup> Federalism may be referred to as the theoretical basis of a federation. It is a set of principles that determine the organization, functions, and decision-making process of a federation. A federation, or a federal state, is a set of legal and governmental institutions which enable us to distinguish a particular state from both unitary states and confederations.<sup>3</sup> Federalism is according to Suchecki ‘a dynamic which develops various forms of federal state.’<sup>4</sup> Thus federalism is both an idea and a process while a federation is the manifestation of these ideas and is subjected to the process mentioned above. It is worth mentioning that federalism as a theory of a phenomenon relates not only to the federal state but also to other subjects where we have to deal with a specific type of competence-sharing between the respective units of a particular community.

The popular understanding of the concept of federalism links this term with some kind of territorial structure. It ought to be remembered that the territorial divisions within a state do not definitely settle the question concerning its structure or character of government. With regard to this point other factors are essential, including the division of powers between the respective branches of government. The issues concerning federal states are particularly affected by terminological difficulties. Federal states, also known as union states or simply federations, are comprised of smaller units called member states, lands, *länder* and counties, or depending on the state – lands, cantons and states. From the perspective of a political system the actual terminological issue is not particularly important.

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<sup>2</sup> P. Czarny, *Bundesrat. Między niemiecką tradycją a europejską przyszłością*, Warszawa 2000, p. 7.

<sup>3</sup> W. Suchecki, *Teoria federalizmu*, p. 94.

<sup>4</sup> Ibid.

## 1.2. Confederation and federation

Confederation is one of the forms of government that is based on the federal principle. Confederation is the 'elder sister' of federation. The process of turning a confederation into a federation is intellectually interesting, as well as identifying when this process might be considered to have been completed. In order to answer this question one must shed some light on the meaning of this term. According to the definition proposed by Sczaniecki, 'confederation, or a union of states, consists of sovereign states joined together in order to deal with some general, strictly defined and limited common aims.'<sup>5</sup>

Suchecki points out: 'The differences [between a federation and a confederation] are both of a quantitative and qualitative character, and differ in regard to the extent of their application in particular fields.'<sup>6</sup> The first difference relates to the origin of both forms. It is commonly held that a confederation originates as an international agreement made between sovereign states, while a federation is based on the rules of domestic law. The other difference lies in the character of the union. A confederation is not a separate and self-dependant state, while a federation definitely is. From this fact springs another difference when it comes to the issue of sovereignty. A confederation does not possess sovereignty; it belongs only to the entities which agreed the union. In contrast, in a federation, sovereignty, depending on the approach and the theory, belongs to the entities that create the union, as well as to the federation itself.<sup>7</sup> The problem of durability of both forms is also a subject of research. According to the definition mentioned above, a confederation constitutes a union that has been established in order to attain concrete goals, and after having fulfilled them it should, in theory, be liquidated. In contrast, a federation is a permanent union. Some other differences become apparent when we take into account legal regulations within both political forms. It concerns not only the process of enacting and implementing various laws, but also the character of relations between the branches of the constituent units belonging to the union and the branches of the federal government. Generally speaking, a confederation may be regarded as being a less coherent entity due to the fact that it has no power to impose its own laws and political will on the constituent states. The nature of the confederation's policies and whether, indeed, they will in fact be implemented, is entirely dependant upon the will of the constituent states and the choices that they make. It should be emphasized that the decision-making process within a confederation should be conducted unanimously. This latter condition is a distinctive feature of a confederation in comparison to a federation. In a federa-

<sup>5</sup> M. Sczaniecki, *Powszechna historia państwa i prawa*, Warszawa 1997, p. 520.

<sup>6</sup> W. Suchecki, *Teoria federalizmu*, p. 99.

<sup>7</sup> The issue of sovereignty in a federal state has raised controversy since the very emergence of such states. These issues are discussed more fully in the following part of this article.

tion, in order for a decisions to be legally binding, a majority of votes is needed, or sometimes a qualitative majority.<sup>8</sup>

The above mentioned features concerning the character of a confederation and a federation have rarely occurred in their pure forms. During the process of shifting from loose international co-operation towards some more binding forms of linkage, including a federal state, the various elements have been mixed and only a case study would allow us to determine the character of a particular union. It is no accident that confederation used to be called a union of states while a federation was a union state.

### 1.3. Federalism and centralization

In discussing matters concerning federalism and the federal state we cannot avoid mentioning the issue of the centralization of governmental power. Federalism, or rather federalization, as has been already acknowledged, is a process which aims to 'find a compromise between a particular interest and the interest of the whole.'<sup>9</sup> In order for this aim to be achieved it is necessary to establish the appropriate institutions which would guarantee to respect the rights of the constituents, and recognize that they have their own interests, and would guarantee the participation of these constituents in the decision-making process in matters that pertained to them. Centralism and centralization is a process quite contrary to the principles of federalism. Through this process the central government seeks to secure as many entitlements as possible and to gain control over other units that possess legal powers.

Federalism is represented by a federal state and centralization by a centralized state.<sup>10</sup> While on the face of it, these two concepts seem to contradict one another, they do not in fact completely exclude each other, and, moreover, they are tightly connected. As soon as federal states emerged, and even before that time, there has been a struggle between two conceptions: the federalist, which aims to share powers between two levels of the state, and the centralist, which tries to secure a dominant position within the federation for the central government. In most cases a compromise has proved to be workable. The constitutions of federal states may serve as the best example of such compromises, especially when we examine in detail the projects presented earlier by both sides.<sup>11</sup> However, the passing of a constitution usually does not bring the argument between federalists and centralists to an end; it usually only moves it up to another level.

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<sup>8</sup> For more information about differences between federation and confederation, see W. Suhecki, *Teoria federalizmu*, pp. 100-114.

<sup>9</sup> Ibid., p. 94.

<sup>10</sup> I choose not to use the term 'unitary state' because when discussing the process of centralization, I relate this phenomenon to the states that possess complex structures. The very structure of the state, whether it has a federal or unitary character, does not decide whether the former corresponds with a decentralized model and the latter with a centralized model.

<sup>11</sup> For example, see the constitution of Switzerland from 1848 or the Austrian constitution from 1920.

As noted above, the constitution very often cannot determine the exact nature of the division of powers. Contemporary federal governments and agencies are particularly prone to acquiring competences reserved for their constituents. It is often done without the consent of the latter. The financial dependence of the constituents on federal aid represents another form of centralization.

## 2. FEDERAL PRINCIPLES AND INSTITUTIONS

Now we will enumerate the principles and institutions that are characteristic of federal political systems. Federal principles and institutions can be matched in pairs: each principle always corresponds with a political institution. The principles will be discussed first because they are established prior to the institutions and determine their function.

### 2.1. The principles of federalism

Federalism itself is a principle of government. It is a particularly complex phenomenon, therefore in order to fully understand its essence it must be analyzed with the assistance of the other principles it comprises.<sup>12</sup> This catalogue may be more or less detailed depending on the research methodology adopted and what one seeks to prove; and not the presentation of the issue. I will discuss below the most important principles, from the perspective of the political system, that are present in federal political systems. The distribution of competence is a very complex principle which is itself derived from other principles; it therefore must be examined in some detail and its origins explained. In contrast, the principle of participation does not need to be discussed at length because it is clearly illustrated by the institution of a lower house in a federal political system; this will be briefly discussed when we examine institutions.

#### 2.1.1. The division of power and competence in a federal state.

The principle of sovereignty and autonomy in a federal state

Besides the traditional (horizontal) division of power between the executive, legislature and judiciary in a federal state, there is also a vertical division of power, namely a division of competence in particular fields of political power between the federal level and the constituents' levels. The division of competence between the constitu-

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<sup>12</sup> Some authors when discussing the phenomenon of federalism neglect the issue of values and institutions which are characteristic of this sort of political system: see, for example, W. Suhecki in his *Teoria federalizmu*; others present the principles of federalism in the form of a single catalogue and do not distinguish between them. For example, see F. Kinsky, who writes about the principles of federalism while describing its institutions. See F. Kinsky, *Federalizm – model ogólnoeuropejski*, trans. by B. Harasimowicz, M. Harasimowicz, Kraków 1999, pp. 50-58.

ents of a federation and the federation itself should be regarded as being the most essential and most important of all the federal principles. This division determines the character of the federalism in particular states. As Weber noted, by examining the division of competence one can presume the future development of a federal system – whether it tends towards centralization or, on the contrary, towards a further strengthening of the constituents of the federation. In this context the division of competence indicates the political position of the constituent states in the federation. In the classical concept of a federal state, the division of competence is supposed to secure the interests of constituent states.<sup>13</sup> This is how it is supposed to be in theory; reality, however – as has already been noted – is subject to permanent change, both qualitative and quantitative.

Now the article will turn to the issue of justification of the vertical division of power. This issue is strictly linked to the problem of sovereignty in a federal state. Some authors pay a great deal of attention to this problem.<sup>14</sup> Others neglect this issue and substitute the term ‘sovereignty’ with that of ‘autonomy.’<sup>15</sup>

The problem of sovereignty – despite not being the most important when discussing federalism – should not be neglected. Sczaniecki has written: ‘There is a dispute with regard to whether sovereignty is vested in a federation or also in the constituent states. According to international law sovereignty belongs generally only to a federation, and in a confederation to the confederated states. The issue raises questions because no fixed line exists between a federation and a confederation and it causes serious difficulties when it comes to deciding what kind of union should be formed between states.’<sup>16</sup> He points out that we also encounter terminological confusion with regard to complex states, like, for example Switzerland, which is a federation but presents itself officially as a confederation.<sup>17</sup>

A research problem appears at the very outset. Like in the case of a federation there is no single definition of the concept of sovereignty.<sup>18</sup> Generally speaking, sovereignty is a feature of the state which consists of its exclusive power and independence namely the ability of its legal structures to take independent decisions covering

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<sup>13</sup> K. Weber, *Kriterien des Bundesstaates. Eine systematische, historische und rechtsvergleichende Untersuchung der Bundesstaatlichkeit der Schweiz, der Bundesrepublik Deutschland und Österreichs*, Wien 1980, p. 90.

<sup>14</sup> W. Suhecki begins his book that examines the theory of federalism with a discussion of this issue and regard, as it is essential for further consideration. See W. Suhecki, *Teoria federalizmu*, ch. I.

<sup>15</sup> See F. Kinsky, *Federalizm...*, pp. 50-51.

<sup>16</sup> M. Sczaniecki, *Powszechna historia...*, p. 521.

<sup>17</sup> *Ibid.*, p. 521. The full name is the Confederation of Switzerland. Additional terminological confusion is introduced by the name of its constitution – The Federal Constitution of the Confederation of Switzerland.

<sup>18</sup> The presentation of the historical evolution of the concept of sovereignty is not the purpose of this article, so I confine myself to presenting the relationship between this concept and the general theory of federalism. For more information about the concept of sovereignty in a federal state, see W. Suhecki, *Teoria federalizmu*, p. 55.

all matters on its entire territory. Sovereignty is also the state's ability to exist as an independent entity in international relations.<sup>19</sup> This short presentation tells us nothing about the concept of sovereignty in a federal state. It should also be noted that there is no established paradigm among researchers in terms of the character of sovereignty in a federal state. Some believe that sovereignty is vested in both the federal state and its constituents; others assume that only a federal state is sovereign and deny that its constituent states possess this quality.

The concept of sovereignty would become useful in the context of federal state theory if we could define its content in a more detailed way. Sovereignty can be divided into two types: legal and political. The former relates to the government which enacts and establishes laws; the latter is connected with the ability to influence the government's decision-making process, for example through elections. The precise division of sovereignty into legal and political parts can be found, for the most part, in a constitution. Suchecki emphasises the fact that this division is important when we try to understand in what way political sovereignty does influence the forming of the legal sovereignty in a federal state.<sup>20</sup>

The next significant division is that between internal and external sovereignty. It relates to the above mentioned features of sovereignty, namely exclusive power which is internal sovereignty, and independence which is external sovereignty. According to some theories states after joining a federation lose their external sovereignty while preserving their internal sovereignty.<sup>21</sup>

Reflections on the concept of sovereignty are not overly important here. What is important is to find some answers to the question as to which side possesses sovereignty; in other words, who is the bearer of sovereignty in a federation. Researches have been discussing this issue from the moment federal states came into existence. Some authors pay attention to the fact that a federation is a union of states; that is, a union of sovereign entities that do not lose their sovereignty when agreeing to a union but only consent to some limitations. According to this conception, a federal state is a sort of confederation that emerges as a result of a voluntary agreement between states. This agreement, as well as the federation, should help when it comes to conducting certain tasks both in the spheres of foreign policy and internal policy, although some limitations apply to the latter. Some other researchers go even further and assert that – from the legal point of view – there is no such thing as a federal state, and therefore it cannot possess sovereignty.<sup>22</sup> These concepts originated out of a need for increasing the degree of decentralization in newly established federations during the nineteenth century in the United States and Germany, and also, in later periods, in other states.

<sup>19</sup> G. Michałowska (ed.), *Mały słownik stosunków międzynarodowych*, Warszawa 1996, pp. 239-240.

<sup>20</sup> W. Suchecki, *Teoria federalizmu*, p. 55.

<sup>21</sup> Ibid., p. 60.

<sup>22</sup> This position was defended by M. Seydel, see M. Seydel, 'Der Bundesstaatsbegriff', *Zeitschrift für die gesamte Staatswissenschaft*, 1872, p. 198. According to W. Suchecki, his views were disregarded because it did not correspond with the facts. See W. Suchecki, *Teoria federalizmu*, p. 164.

Obviously, there are conceptions quite contrary to those presented above which assume that sovereignty is a feature that belongs solely to a federal state. They presuppose that the central government is superior to the governments of the constituent states. From this fact follows another conclusion: that the constituent states are not sovereign but only autonomous in regard to certain legal competences.<sup>23</sup> Jellinek's conception is one of the best known and it links sovereignty to the exercising of government power. He believes that only the federal state is sovereign. Constituent states possess partial sovereignty in the form of the possibility of performing some governmental tasks that have been clearly delegated to them by the constitution.<sup>24</sup> The government of a federation is the limit of this delegated power. In order to avoid blurring the differences between the constituent states and any levels of administrative division in a unitary state, these conceptions indicate that the constituent states participate in the process of federal law-making, especially through the lower houses of parliament.<sup>25</sup>

Both the above mentioned ways of thinking about sovereignty in a federal state represent extreme positions. The first concept gives voice to particularism and comes closer to the confederalistic concepts than to the theory of the federal state. The second concept represents a centralistic way of thinking about federalism which aims to centralize federal states. As we have mentioned before, federalism is not an easily definable phenomenon. The same can be said of the issue of sovereignty in a federal state. Apart from those concepts that have already been discussed there is also a third one. It is the concept of the sharing of sovereignty within a federation.

According to its premises, sovereignty is divisible because the tasks of a federal state are also divisible. All the entities contained within a federation, namely the constituent states and the federal state itself, have their own tasks which are performed separately. Both kinds of entities possess their own political and legal systems.<sup>26</sup>

To summarize the issues concerning sovereignty in a federal state we need to note that the choice of conception is dependent upon the formulated goals. Federalists will tend to endow sovereignty to the constituent states, whereas unitarists will be inclined to conceive of sovereignty as being vested only in a federation. The popularity of both theories has been largely dependent upon historical circumstances. The former conception became more popular at the beginning of the federal era because the constituent states were afraid of being absorbed into federal states. When the times changed the latter conception gained more support.

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<sup>23</sup> Ibid., p. 166.

<sup>24</sup> G. Jellinek, *Die Lehre von den Staatenverbindungen*, Berlin 1882, p. 770. On other conceptions that treat the federal state as the only sovereign entity see W. Suhecki, *Teoria federalizmu*, pp. 165-166 and K. Weber, *Kriterien des Bundesstaates...*, pp. 68-70.

<sup>25</sup> W. Suhecki, *Teoria federalizmu*, p. 172.

<sup>26</sup> W. Suhecki believes that this concept, proposed in German science by G. Weitz, did not find many followers because the division of sovereignty came to be seen as a political postulate and not a legal issue. See *ibid.*, p. 176. Despite these reservations this theory should not be dismissed because federalism and the federal state are not only legal, but mainly 'political' phenomena.



But it now seems that neither of them has been implemented in its pure form in the political and legal practices of federal states. Constituent states of the federation are not entities in the sense of international law, but they are often allowed to conduct their own independent foreign policy in certain specified areas, even though they cannot be regarded as being sovereign. However, they have the right of self-determination and a state-like system of governmental institutions. Kinsky's view would appear to be justified when he states that the constituent states of a federation are autonomous and we should therefore skip over the issue of sovereignty.<sup>27</sup>

In order to eliminate the troublesome issue of sovereignty in federal states we can substitute it with the concept of political power which – if we consider the fact that the nation is sovereign – seems both logical and practical. There is no single and definite pattern when it comes to the division of competences in a federal state. In each case it depends upon the political situation at the time of settling these matters; that is, at the moment of enacting the constitution and in the period following, as well as upon the political forces in a particular federal state. In addition, the division of competence between the constituents and the federation has the characteristics of a process, namely it is subject to permanent change that results in the shifting of competences between the entities mentioned above or the delegation to them of new tasks.

In a federal state the division of competence is usually regulated by a federal constitution. Now we will consider the issue of competence of competence (in German, *Kompetenzkompetenz*); that is, the right to establish a division of competence between the entities of a federation. This right is usually vested in a federation.<sup>28</sup> Suhecki writes that the division of competence may be arbitrarily established by a federation without the consent of the constituent states.<sup>29</sup> As far as we can theoretically conceive of such a situation, it should be noted that this concerns undemocratic states in which even the basic principle of federalism has not been fully realized.

Federal constitutions differ in terms of the division of competence between the federation and constituent states. A constitution may enumerate them in detail. Such a solution has its advantages: for example, it eliminates competence disputes, but in turn it needs to be modified frequently in order to adjust the law to the ever-changing legal and political reality. The general division of competence is another possibility. This solution frees the legislature from making frequent changes in the constitution, which is particularly advantageous for the stability of the system, but carries an inherent risk that competence disputes between various institutions on many levels may break out.

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<sup>27</sup> F. Kinsky, *Federalizm...*, pp. 50-51.

<sup>28</sup> K. Weber writes with regard to this issue that the decision concerning the division of competence belongs to the federation, but member states possess the material abilities to influence the changes.

<sup>29</sup> W. Suhecki, *Teoria federalizmu*, p. 223.

The exchange of competences and the granting of them to a particular entity – a federation or a constituent state – is another issue. In this case there are also various possibilities.<sup>30</sup> A catalogue that enumerates the competences of a federation is one of the most known and popular solutions. A federation's competence must be precisely specified in the constitution, while all other matters not included in this catalogue are in the competence of the constituent states.<sup>31</sup> The presumption of competence constitutes the principle that is involved here.<sup>32</sup> The system of competitive competence (which is present in the German political system) assumes that if we deal with competences that have not been explicitly granted either to the federal state or to the constituent states (lands), these competences are vested in *Länder* until otherwise decided by the federation.<sup>33</sup>

The division of competence relates to the principle of the legal and political equality of the constituent states. This principle may sometimes be impaired. A horizontal division of competence between particular constituent states may occur when one of them reserves special rights for itself.<sup>34</sup>

The division of competence between the entities of a federation requires a decision as to what institutions are needed and in what way they will exercise their powers. During the period in which the first federal states were established, their governments did not possess exclusive administrative systems, and therefore, in order to exercise their competences, they had to use the administrative systems of their constituent states. This was the case in the German Reich from 1871 onwards. Granting control of the regional administration to federal civil servants is another solution to this problem. In some cases, it presupposes the use of federal administrative institutions; in others, those of the constituent states.<sup>35</sup>

The division of competence in a federal state is a vitally important issue. It determines the character of the federal system and the lines of its development. It is a point of departure for all further reflection on this phenomena and research into particular federal systems. At this point it should be emphasised again that the catalogue of competences has not been established once and for all and it is subject to constant change. Federal constitutions usually grant to the federation the following competences: foreign policy, defence, financial policy and the highest levels of the judiciary.<sup>36</sup>

<sup>30</sup> Undemocratic states that have a federal structure include the Soviet Union and the German Democratic Republic until 1952.

<sup>31</sup> On other possible divisions of competence in federal constitutions see Suhecki. He gives examples of South Africa and the Dominion of Canada which enumerated both the competences of the federation and the competences of the constituent states, while the all remaining issues were subject to federal regulations. W. Suhecki, *Teoria federalizmu*, pp. 232-237.

<sup>32</sup> K. Weber, *Kriterien des Bundesstaates...*, p. 91.

<sup>33</sup> F. Kinsky, *Federalizm...*, p. 56.

<sup>34</sup> W. Suhecki, *Teoria federalizmu*, p. 240.

<sup>35</sup> *Ibid.*, p. 242.

<sup>36</sup> F. Kinsky, *Federalizm...*, p. 55.

### 2.1.2. Participation

The participation or engagement of the constituent states when it comes to decision-making pertaining to matters of state is another feature that is characteristic of federal political systems. This principle is discussed here because it supports a concrete federal institution, and, as was mentioned before, every federal institution is backed by one of the federal principles formed prior to it. This is equally true of participation. This principle is realized in a federal state through a second house of parliament. It is worth noting that the problem of the participation of constituent states in matters concerning the entire federation is much more complex and cannot be confined to the existence and work of the second house.

The principle of participation is connected to the above mentioned issue of sovereignty in a federal state. The constituent states of a federation are treated as political entities which, like citizens, should have political representation at the federal level in order to allow them to present their views on all substantial matters relating to them or to the whole federation.

The constituent states' level of participation in matters concerning the federation varies in each particular case. Both history and current politics are among the determinants of this issue. In federal states where federalism has been established as a result of a bottom-up process that involved small communities, as in Switzerland, the level of participation of constituent states is high. It can be seen not only in the participation of particular states' representatives in the work of the upper house of parliament but also when it comes to appointing the members of the government.<sup>37</sup> In states where federalism came into being as a result of a compromise between centralistic tendencies which very often were in a stronger political and economic position (as in Prussia in the nineteenth century) and the real need and the will to unify (on equal conditions) expressed by other states, the constituent states may influence the whole federation by a legislative procedure, as well as by appointing members of the executive. The latter is of rather symbolic significance because it relates to the election of a federal president whose function is purely ceremonial.<sup>38</sup>

The lowest level of participation of constituent states can be encountered in those federal states in which federalism itself was born out of a political need,<sup>39</sup> or as a result of the central government's attempt to pacify emerging separatists, as in the case of Austria. The participation of constituent states in matters concerning the whole federation is more difficult under these circumstances and it manifests itself mainly in the fact of the existence of the second house of parliament in which their representatives sit. The powers of this

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<sup>37</sup> Ibid., p. 57.

<sup>38</sup> Ibid.

<sup>39</sup> Soviet federalism is an example of federalism that was 'politically commissioned', without giving any real powers to the member states. On Soviet federalism see W. Suchecki, *Teoria federalizmu, passim*.

house are limited and it cannot effectively oppose the lower house which represents the interests of the entire federation and very often tends towards centralization.

The participation of the constituent states may also take other, less formalized shapes. Constituent states can work out a common position on matters concerning the entire federation and then present it at the federal level or to public opinion, and in that way seek to advance their interests. In contemporary states, not only among federal, but also among unitary states with a decentralized structure there has been a struggle between the federal or central government and the constituent states or administrative units. Depending on circumstances, one of these levels of government will prevail. This issue is connected with the above mentioned problem of participation because a political system that tends towards centralization may impair the degree of participation or even eliminate it. In such an eventuality, it is hard to talk in terms of a federal system. Hence we can draw the conclusion that the participation of constituent states is one of the essential principles of federalism.

## 2.2. The institutions of federalism

Federal institutions are the derivatives of the principles presented above. A political institution is not only a group of people, or an organized political actor having at its disposal the ways and means to participate in political life.<sup>40</sup> It is also a set of rules of law relating to a particular political activity.<sup>41</sup> In discussing selected federal institutions both types of institution will be examined, namely an institution conceived as a concrete body and an institution conceived as a set of rules that regulate certain activities. As in the case of federal principles we will discuss only a few federal institutions. Firstly, the federal constitution will be examined. Secondly, we will focus on the institution and the functions of the second house in a federal political system. Thirdly, federal financial policy will be discussed. Putting financial policy into the catalogue of federal institutions may lead to objections; nevertheless, it is one of the most important institutions and it facilitates the correct workings of the federal system.

### 2.2.1. The constitution of a federal state

In addition to its traditional functions, a federal constitution is the guarantor of a federal system. Suchecki writes that the tasks set by a federal constitution are incomparably more complex than those of unitary state.<sup>42</sup> It is hard to disagree with this statement. A federal constitution usually originates in a quite specific set of circumstances.<sup>43</sup> States that decide to establish a federation seek to secure as many of their

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<sup>40</sup> For this definition see A. Antoszewski, R. Herbut (eds.), *Leksykon politologii*, Wrocław 2000, p. 180.

<sup>41</sup> Ibid.

<sup>42</sup> W. Suchecki, *Teoria federalizmu*, p. 304.

<sup>43</sup> It relates to the issue of the passing of the first federal constitution in particular states.

own interests as possible, but simultaneously a new entity – the federation – claims its own rights. The problem of reconciling various tendencies in order to ensure that the federation functions effectively is the goal of a constitution.

It has been argued that only a written constitution may be the guarantor of preserving and respecting the rights of the constituent states.<sup>44</sup> This opinion is not controversial since federal constitutions were often established as a result of international agreements between various entities and took the form of written documents.

A federal constitution outlines the division of competence between the federation and its constituent states and because of this very fact it is the most important of all the federal institutions. However, its tasks extend far beyond this. When competence disputes need to be dealt with, it settles who is entitled to make the decision or resolve a particular problem.

A federal constitution determines in detail the procedure of changing the constitution. It is usually quite complicated and requires wide consent. It differs depending on the state but there is a general rule that a change in the constitution must be agreed to by the majority of both the lower house and the second house, as well as by the people, or by a qualified majority of the constituent states' parliaments. It is also true that there are federal constitutions that may be modified by an act of parliament that requires some form of qualified parliamentary majority.<sup>45</sup>

Despite these specific precautionary measures which aim to secure the rights and interests of constituent states, we cannot exclude the possibility that gradually they may become marginalized and that the system may acquire a centralized form of government. In federal states there has always been competition between the central government connected with the federal authority and the constituent states. Each has sought to increase its powers and competences at the expense of the other. The new tasks that modern states have to fulfil and the apparent domination of a federation at the administrative level of the federal state, has made federal governments more significant in recent times. It was also been affected by the changes to constitutions which have granted more rights to the federation.

A federal constitution also performs some other functions. One of them is to guarantee the compatibility with all other acts of law passed by the constituent states, as well as the requirement on the part of the constituent states to be compatible with the federal constitution. Despite the fact that in a federal state two legal orders co-exist (the federal and that of the constituent states) there is certainty that in terms of the political system they will be compatible.

### 2.2.2. The second house of parliament in a federal political system

Zwierzchowski has pointed out that in a federal state we have to deal with dual representation at the federal level. Besides the body that represents the sovereign – the

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<sup>44</sup> This position is presented by W. Suhecki, *Teoria federalizmu*, p. 304.

<sup>45</sup> This procedure is in force in Austria.

nation as a whole – there is another body that represents the constituent parts of the federation.<sup>46</sup>

As has been mentioned before, the institution of the second house in a federal system is the main expression of the constituent states' participation in the federal structure and an instrument for influencing overall federal policy. The very existence of the second houses of parliament, as well as their right to co-decide all essential public matters, are usually regarded as being a quintessential part of federal political systems.

The second house – traditionally called the upper house – was originally the first house. It was only the rise of democracy and the popularization of universal suffrage, as well as the fact that decisions were transferred to the lower house (which also exercises political control over the government) that has changed the position of both houses, which may be visible in a new nomenclature regarding the various parts of the parliament.<sup>47</sup>

Second houses can be encountered in both federal and unitary states.<sup>48</sup> The legitimacy of their existence and their function in federal states has as its basis the necessity of representing constituent states' interests. The genesis of second houses in federal states should be linked to the very beginning of the federation, when independent entities decided to engage in co-operation, and subsequently came to renounce some of their powers in favour of the newly created entity, namely the federal state. Constituent states have not always easily agreed to the qualitative change that would lead to a loss of some powers. The establishment of a body that would represent their interests and allow for the exchange of their opinions may be viewed as a form of compensation. The recognition of second houses may be illustrated by the fact that both houses are constitutionally of equal rank. Second houses, like lower houses, participate in the legislative process and in the shaping of the political system.<sup>49</sup>

The representation of constituent states' interests is the basic reason for the existence of second houses in federal states. We should now turn to discussing the process of electing members of both houses because it somehow helps to determine their character.

In regard to this point there are various possibilities. Weber discerned three basic types.<sup>50</sup> First, there is the system of the federal council in which members are elected by local assemblies or are even identical to them. This is a very pragmatic solution,

<sup>46</sup> E. Zwierzchowski (ed.), *Izby drugie parlamentu*, Białystok 1996, p. 13.

<sup>47</sup> The change in the position of both houses is discussed by Weber. See K. Weber, *Kriterien des Bundesstaates...*, p. 127. See also E. Zwierzchowski in his book on second houses. E. Zwierzchowski (ed.), *Izby drugie...*, p. 7.

<sup>48</sup> The second houses in unitary states have not only a different legitimization of their function but also possess a different range of competences than those in federal states. For more information see E. Zwierzchowski (ed.), *Izby drugie...*, *passim* and J. Szymanek, *Izby drugie parlamentu w procesie ustawodawczym*, Warszawa 1999, *passim*.

<sup>49</sup> E. Zwierzchowski (ed.), *Izby drugie...*, p. 13. This is a formal approach, federal practices vary. K. Weber writes that the competences of a second house in a federal state are rarely counterbalanced by the competences of a lower house. See K. Weber, *Kriterien des Bundesstaates...*, p. 127. The position of the second house in Switzerland is radically different from that in Austria.

<sup>50</sup> K. Weber, *Kriterien des Bundesstaates...*, p. 128.

one that subordinates the second house to the executives of the constituent states. The advantage of this solution lies in the fact that it allows day-to-day politics to be effectively bypassed, and therefore improves the quality of the debates, which can now pay more attention to concrete or even technical issues.

The second model is a system of the Senate. The deputies of the second house are elected in universal elections. The constituent states are in these cases usually the same as the constituencies. On the one hand, this solution strengthens the relationship between voters and deputies; but on the other hand, it may have a negative impact on the representation of constituent states' interests in the second house since it leads to political and partisan divisions.

The last type proposed by the above mentioned researcher is a model of the second house that consists of members elected by the state parliaments. This system, like the previous one, is strongly dependent upon a party system which, unfortunately, does not help to represent the constituent states' interests and makes – through party instructions – the second house dependent on the lower house. Instead of representing local interests, the deputies represent political factions.

Zwierzchowski adds one more type of electoral system to the second house in which deputies are nominated by the prime minister in response to the applications of local communities.<sup>51</sup>

Regardless of the electoral systems, the role of second houses in the political system of a federal state cannot be disregarded. The position of the second house in the system of government has been constantly evolving. Originally it was the dominant body but over the course of time its position has diminished, and now in all federal states there is some discussion as to whether to reform this body in order to re-establish its primary function of representing the constituent states' interests, as well as to improve its work. Whatever the results of these discussions, second houses will still remain institutions that actualize one of the most important principles of federalism; that is, participation.

### 2.2.3. Financial policy in a federal state

Financial policy is one of the key issues when discussing problems connected with the theory of a federal state. Many authors used to neglect this issue, paying attention solely to the issues of the political system. It should be remembered that all regulations concerning the division of competence, participation etc., without an adequate financial policy, probably would be wholly ineffective. For this very reason, financial policy should be regarded as a federal institution. By skilfully influencing this policy one can truly influence the form of federalism in each particular state.

In the German language financial policy is derived from the term financial compensation – *Finanzausgleich*. This term was introduced as early as the late nineteenth

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<sup>51</sup> E. Zwierzchowski (ed.), *Izby drugie...*, p. 14. This system of electing the second house is in force in Canada.

century in Switzerland in order to describe the financial relations between the federation and the cantons.<sup>52</sup> Since then, it has become popularized and is now used also in Germany and Austria for the overall financial policy concerning the regulations between the federation and the constituent states.

Financial policy in a federal state is derived from the principle of the division of competence between the entities of the federation and the principle of the participation of the constituent states. Kinsky has written that the autonomy of constituent states must be guaranteed not only by a constitution but must also be supported with appropriate funds.<sup>53</sup>

If we assume that there exists a division of tasks in the federal state and we highlight the entities responsible for performing them – either constituent states or a federation – we must also indicate the source of financing. So when discussing issues concerning financial policy in a federal state we have to keep on mind three categories: the division of tasks, the division of expenditures and the accumulation of revenues.<sup>54</sup>

The main aim of financial policy is to distribute resources in such a way that will allow all the entities of the federation to perform equally their tasks.

From this we can draw a conclusion that financial policy should regulate not only the vertical flow of money between the federation and the constituent states, but that it is also supposed to secure an appropriate flow of money between particular constituent states. The federal constitutions also guarantee an equal tempo of development as well as equal access to the welfare state for all citizens regardless of what constituent state they inhabit. However, it is quite obvious that economic development will vary depending on the region, which may limit the access of citizens to goods, both material and symbolic. This would suggest that financial policy has its place, because of its ability to form and influence. A good financial policy in a federal state seeks to level the differences that result from unequal economic development.<sup>55</sup>

Managing financial policy is not a simple task. Many structural problems may resurface during its implementation. Firstly a division of expenditures between the federation and the constituent states should be specified and allotted. It is then necessary to establish a system that protects citizens against double taxation. Finally, financial abilities as well as the needs of the constituent states should be assessed.<sup>56</sup>

Weber pointed out three possible variations when it comes to conducting financial policy in a federal state. The first is a system of separation. It presup-

<sup>52</sup> K. Weber, *Kriterien des Bundesstaates...*, p. 171.

<sup>53</sup> F. Kinsky, *Federalizm...*, p. 51.

<sup>54</sup> K. Weber, *Kriterien des Bundesstaates...*, p. 172.

<sup>55</sup> These differences are not necessarily the structural results of bad state policy; they may arise from different geographical or economical conditions of particular member states.

<sup>56</sup> K. Weber, *Kriterien des Bundesstaates...*, p. 173.



poses that each entity of the federation decides separately about the sources of financing and taxes. This solution inevitably leads to double taxation and as such it does not exist in a pure form in any federal state. There is also an attenuated version of this variant in which all the entities within the federation conduct consultations in order to avoid double taxation. The joint system is another variant. In this system the right to determine the sources of revenue belongs only to one entity of the federation – the union, the lands or even counties.<sup>57</sup> The last variant is a mixed system. It brings together the features of separate and joint systems. Particular entities within the federation can use their own financial sources, as well as those transferred from other entities. It seems that this is the optimal system because it gives independence to the constituent states in financial matters and it simultaneously secures them against huge discrepancies in public spending.<sup>58</sup>

Financial policy in a federal state is firmly connected to the exercising of competence by particular entities. It was shaped originally in that way in order to secure enough funds for the realization of shared tasks conducted by the federation. Over the course of time the situation completely changed and constituent states became forced to seek funds for financing their own policy. Along with the development of federal states and the increase of tasks performed by the union, constituent states became increasingly dependent on the financial policy of the federation because it makes decisions regarding taxation. It sometimes also happens that taxes collected at lower levels – in the constituent states or counties – are transferred to the centre and are then redistributed. This situation also has some advantages in that it allows a federal state to increase the rate of development of particular regions and to care equally for all citizens.

### 3. THE CLASSIFICATION OF FEDERAL STATES

As has been already mentioned at the beginning, there is no single and coherent theory of federalism, nor is there a single type of federal state. When constructing typologies of federal states various factors must be taken into account. Their shape hinges on the researcher's intention or goal. Two typologies of federal states will be discussed below. One focuses on the genesis of a federal state, and the other analyses in detail the relations between the particular entities of a federation.

#### 3.1. The division of federal states in relation to their genesis

The genesis of a federal state has a vital influence on its future development. It determines to a large extent the division of competence between the constituent states

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<sup>57</sup> K. Weber enumerates different variants of this system. See *ibid.*, p. 174.

<sup>58</sup> *Ibid.*, pp. 173-174.

and the federation. Suhecki mentions several possible ways in which federal states can be established.<sup>59</sup>

Concluding an agreement between independent entities, not necessarily states, is the first possibility.<sup>60</sup> Another possibility is to establish a federal state through an agreement between sovereign states that were previously parts of a unitary state. In this case, before a new federal state can emerge the old unitary state must be dissolved, very often as a consequence of decentralization. This solution may help to prevent the fragmentation of the state or strivings for secession. In such cases, federalization is the only way of saving the state.

Another similar way of establishing a federation is to give territorial units the status of constituent states through a constitution. The central government plays a major role in this process, which implements this solution as an act of its own independent will.

Another possibility occurs when a federation is established by entities that previously were under the influence of a colonial power and then gained independence. These entities were not previously sovereign states, hence we can conclude that secession occurred and a new entity was created.

The next possibility presupposes turning a confederation into a federation. This process changes the status of these political systems. In this case, sovereign entities become member states of a federation and give up some of their sovereign rights. They accept the creation of a sovereign authority that will make decisions which concern the entire new entity, according to the principle of majority rule, including those constituent states which do not agree with some of the solutions.

The possibilities mentioned above are some general types. They have all played a role in the genesis of many federal states. This does not mean, however, that this typology is anything more than a helpful instrument when it comes to analysing the division of competence and relations between entities in federal states.

### **3.2. The division of federal states according to the type of relationship between the union and member states**

These relations, despite the fact that they are regulated by federal constitutions, very often acquire a different shape than was originally conceived by the founders of the federation. The progress of civilization and the changes it brings about when it comes to perceiving the function and role of state has caused the emergence of new attempts at regulating these relations. Sometimes they will take an institutional form, sometimes they remain within the area of agreement between the entities of the federation; in addition, there are various projects which seek to build these relations. Now we will present three models of federalism.

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<sup>59</sup> W. Suhecki, *Teoria federalizmu*, pp. 248-249.

<sup>60</sup> These might be counties or territorial communities, as in the case of Switzerland.

### 3.2.1. Functional federalism

Sarnecki distinguishes the concept of executive federalism from functional federalism, writing that in the model of executive federalism the function of federal agencies is limited to administrative activities, excluding the judiciary<sup>61</sup>.

The most important feature of functional federalism is the separation of tasks between the entities of the federation in relation to the functions they perform and not with regard to the division of matters.<sup>62</sup> The federation takes over almost all the tasks relating to the enactment of laws while constituent states are responsible for implementing them.

The term executive federalism can be justified in another way. It suggests that the entities are the major actors responsible for realizing federal policy. In such a model – which adopts such a division of tasks – the constituent states become the active participants of this policy. They take over some tasks which formerly belonged to the parliaments of member states.

Functional federalism assumes the necessity of co-operation between the entities of the federation and requires that they make compromises in order to smoothly implement the laws passed by the union. It is worth mentioning that the latter entities are not completely devoid of influence when it comes to shaping the law that they must implement, because in the legislative process at the federal level they have their representatives who sit in the second house of parliament.

### 3.2.2. Dualistic federalism

This model is characteristic of the solutions adopted in the United States.<sup>63</sup> The model of dualistic federalism assumes the existence of two parallel legal systems and government branches, as well as dual citizenship. In contrast to the above mentioned model of functional federalism, this model divides matters relating to the legislative power of the federation and the member states. Both types of entities possess their own executive and judiciary, which guarantee the implementation and the observance of laws.<sup>64</sup> This model assures the mutual independence of entities in regard to the tasks that have been allotted to them.

<sup>61</sup> P. Sarnecki, *Ustroje konstytucyjne państw współczesnych*, Kraków 2003, pp. 204-205. It should be noted that in the professional German literature the dominant term is 'executive federalism' (*Exekutivföderalismus*).

<sup>62</sup> Ibid., p. 204.

<sup>63</sup> Generally speaking it should be noted that on a theoretical plane each federal system is dualistic because 'duality' is one of the features of federalism. This theory in its pure form remains only a theory, and legal and political practice derive from other solutions, as is the case in the United States.

<sup>64</sup> W. Suhecki, *Teoria federalizmu*, p. 188.

### 3.2.3. Co-operative federalism

This theory of federalism was developed after the Second World War. It is a response to the developing forms of co-operation between the particular entities of the federation – both vertical and horizontal. Numerous relationships between the interests of the federation and the constituent states were emphasized.<sup>65</sup> It became obvious that the dualistic theory of federalism does not correspond with political practice. Many tasks of the modern state may be carried out only through the common initiative of all entities. Weber points to the fact that the co-operation of various entities is a constitutive feature of a co-operative federalism.<sup>66</sup> Co-operative federalism comprises all levels of power.

Co-operative federalism blurs all differences in relation to the division of competence between a federation and member states focusing on the concrete forms of co-operation between various entities. Co-operative federalism facilitates the realization of many tasks, although it may also lead to the financial dependence of member states on the federation. Despite the latter qualification, it seems that nowadays there is no repulsion from this form of federalism due to the fact that it guarantees that the basic tasks of the state will be performed and that various entities will be involved when it comes to fulfilling them.

## 4. SUMMARY

The theoretical analysis of federalism and the federal state that has been presented above obviously does not exhaust the subject-matter. The issues discussed should help the reader to better understand the phenomena in question and explain some of the concepts. It will also be a useful guide for analyzing the federal systems of particular states.

Translated by Arkadiusz Górniewicz

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<sup>65</sup> Ibid., p. 189.

<sup>66</sup> K. Weber, *Kriterien des Bundesstaates...*, p. 226.

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